IN THE SUPREME COURT OF IOWA

IN RE THE MARRIAGE OF JODI LYNN ERPELDING AND TIMOTHY JOHN ERPELDING

Upon the Petition of JODI LYNN ERPELDING, Petitioner-Appellant/Cross-Appellee, And Concerning TIMOTHY JOHN ERPELDING, Respondent-Appellee/Cross-Appellant.	SUPREME COURT NO. 16-1419 Kossuth County No. CDCD002446

APPEAL FROM THE IOWA DISTRICT COURT FOR KOSSUTH COUNTY
THE HONORABLE PATRICK M. CARR

APPELLEE/CROSS-APPELLANT'S BRIEF AND ARGUMENT

MATTHEW G. SEASE
CHRISTOPHER R. KEMP
KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
msease@kempsease.com
ckemp@kempsease.com
ATTORNEYS FOR RESPONDENT-APPELLEE/CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT CORRECTLY DENY JODI'S REQUEST FOR ADDITIONAL ALIMONY AND FOLLOW THE TERMS OF THE VOLUNTARILY CONTRACTED PREMARITAL AGREEMENT IN DIVIDING THE MARITAL ASSETS?

Iowa R. App. P. 6.907

In re Marriage of Francis, 442 N.W.2d 59 (1989)

In re Marriage of Probasco, 676 N.W.2d 179, (Iowa 2004)

In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978)

In re Marriage of Lalone, 469 N.W.2d 695 (Iowa 1991)

In re Marriage of O'Rourke, 547 N.W.2d 864 (Iowa App. 1996)

In re Marriage of Anliker, 694 N.W.2d 535 (Iowa 2005)

In re Marriage of Lalone, 469 N.W.2d 695 (Iowa 1991)

Lehmicke v. Lehmicke, 489 A.2d 782 (Penn. 1985)

In re Marriage of Graham, 574 P.2d 75 (Colo. 1978)

Hoak v. Hoak, 370 S.E.2d 473 (W. Va. 1988)

DeLaRosa v. DeLaRosa, 309 N.W.2d 755 (Minn. 1981)

In re Marriage of Schenkelberg, 824 N.W.2d 481 (Iowa 2012)

In re Marriage of Olson, 705 N.W.2d 312 (Iowa 2005) "

In re Marriage of Wattonville, 2012 WL 1439241 (Iowa App. 2012)

In re Marriage of Wegner, 434 N.W.2d 397, 399 (Iowa 1988)).

In re Marriage of Hansen, 733 N.W.2d 683 (Iowa 2007)

Iowa Code § 598.21A

In re Marriage of Knickerbocker, 601 N.W.2d 48 (Iowa 1999)

In re Marriage of Schultz, 2011 WL 3480971 (Iowa App. Aug. 10, 2011)

In re Marriage of Christensen, 543 N.W.2d 915 (Iowa App. 1995)

Iowa Code §596.3

In re Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008)

Adams v. Adams, 278 Ga. 521, 603 S.E.2d 273 (2004)

II. DID THE DISTRICT COURT CORRECTLY DENY JODI'S REQUEST FOR ATTORNEY FEES AND ERR IN AWARDING JODI TEMPORARY ATTORNEY FEES?

In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999)

In re Marriage of Schenkelberg, 824 N.W.2d 481 (Iowa 2012)

State v. Nelson, 791 N.W.2d 414 (Iowa 2010)

Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)

In re Marriage of Dieger, 584 N.W.2d 567 (Iowa App. 1998)

In re Marriage of Applegate, 567 N.W.2d 671 (Iowa App. 1997)

Iowa Code §596.5 provides

Doe v. Iowa Dep't of Human Servs., 786 N.W.2d 853 (Iowa 2010)

Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2008)

De Stefano v. Apts. Downtown, Inc., 879 N.W.2d 155 (Iowa 2016)

Meinders v. Dunkerton Cmty. Sch. Dist., 645 N.W.2d 632 (Iowa 2002)

In re Marriage of Van Horn, 2002 WL 142841 (Iowa App. 2002)

Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003)

In re Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008)

UNIF. PREMARITAL AGREEMENT ACT §9(c)

In re Marriage of Best, 901 N.E.2d 967 (Ill. App. 2009)

In re Marriage of Nuechterlien, 287 N.E.2d 21 (Ill. App. 1992).

In re Marriage of Ikeler, 161 P.3d 663 (Colo. 2007)

Van Horn, 2002 WL 142841 (Iowa App. 2002)

III. SHOULD THE PARTIES PAY THEIR OWN APPELLATE ATTORNEY FEES?

In re Marriage of Okland, 699 N.W.2d 260 (Iowa 2005)

In re Marriage of Geil, 509 N.W.2d 738 (Iowa 1993)

IV. DID THE DISTRICT COURT ERR IN NOT AWARDING TIM PRIMARY PHYSICAL CARE OF BOTH CHILDREN?

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Metz v. Amoco Oil Co., 581 N.W.2d 597 (Iowa 1998)

Iowa R. App. P. 6.907.

In re Marriage of Junkins, 240 N.W.2d 667 (Iowa 1976)

Iowa Code § 598.1(7) (2013)

In re Marriage of Decker, 666 N.W.2d 175 (Iowa App. 2003)

In re Marriage of Ullerich, 367 N.W.2d 297 (Iowa App. 1985)

In re Marriage of Courtad, 560 N.W.2d 36 (Iowa App. 1996)

In re Sivesind, 680 N.W.2d 379 (Iowa App. 2004)

Iowa Code § 598.41(3) (2003)

In re Marriage of Vrban, 359 N.W.2d 420 (Iowa 1984)

In re Marriage of Jones, 309 N.W.2d 457 (Iowa 1981)

In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992)

In re Marriage of Fynaardt, 545 N.W.2d 890 (Iowa App. 1996)

In re Marriage of Ullerich, 367 N.W.2d 297 (Iowa App. 1985)

In re Marriage of Aronow, 737 N.W.2d 326 (Iowa App. 2007)

In re Marriage of Engler, 503 N.W.2d 623 (Iowa App. 1993)

In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000)

In re Marriage of Hunt, 476 N.W.2d 99 (Iowa App. 1991)

McKee v. Dicus, 785 N.W.2d 733 (Iowa App. 2010)

In re Marriage of Behn, 416 N.W.2d 100 (Iowa App. 1985)

Young v. Gregg, 480 N.W.2d 75 (Iowa 1992)

In re Marriage of Colter, 502 N.W.2d 168 (Iowa App. 1993)

In re Marriage of Worthington, 504 N.W.2d 147 (Iowa App. 1993)

Neubauer v. Newcomb, 423 N.W.2d 26 (Iowa App. 1988)

ROUTING STATEMENT

Transfer to the Court of Appeals would be appropriate as this case presents issues that require the application of existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal and cross appeal from a Decree of Dissolution of Marriage entered July 28, 2016, in the district Court for Kossuth County, Iowa, the Honorable Judge Patrick Carr presiding. The district court order dissolved the marriage of Jodi Erpelding ("Jodi") and Tim Erpelding ("Tim"). The district court entered a custody award of split physical care of the parties' two minor children. The district court further ordered Tim to pay child support and traditional alimony. The district court further followed the parties' premarital agreement for the division of assets and denied Jodi's request for attorney's fees.

Course of the Proceedings

Jodi filed a Petition for Dissolution of Marriage on February 9, 2015. (APP-001, Petition). Tim filed an Answer on February 18, 2015. On June 29, 2015, Jodi filed an application for temporary custody, temporary spousal support, temporary child support and temporary attorney's fees. (APP-007, Temp. App.). The matter was originally set for hearing on July 13, 2015. (APP-010, Order Setting Temp.

Hearing). This hearing was eventually continued to August 24, 2015, due to serious health issues of Tim's attorney. (APP-012, Motion to Continue Temp. Hearing; APP-014, Order Resetting Temp. Hearing). On August 21, 2015, the parties mediated the temporary issues and signed a stipulated agreement. (APP-016, Withdraw of Application; APP-686, Exhibit 301). The case then proceeded to an extensive trial lasting eight days, spread out over nearly two months. The trial originally started on December 2, 2015, and ended on February 19, 2016. (APP-082, Decree P. 1). The district court entered a decree on July 28, 2016, dissolving the parties' marriage. (APP-082, Decree). Jodi filed a timely notice of appeal on August 23, 2016. (APP-133, Notice of Appeal). Tim filed a timely notice of cross appeal on August 31, 2016. (APP-137, Notice of Cross-Appeal).

Statement of the Facts

Jodi Erpelding ("Jodi") and Tim Erpelding ("Tim") were married in 1997 after living together for approximately five (5) years. (APP-140, Tr. 43). Over the course of their marriage they had two boys, W.E. and D.E. At the time of the trial, W.E. was fourteen (14) and D.E. was nine (9). (APP-140, Tr. 43). Prior to the parties' separation and eventual divorce, the Erpelding family lived on the family farm in rural Algona, Iowa. (APP-142, Tr. 45). The Erpelding's family home served as the center of Tim's farming operation. (APP-255, 367, Tr. 204, 720). Tim has primarily been a lifelong farmer and currently farms approximately 2,000 acres along with

some help from his two brothers. (APP-446, Tr. 1228). Tim is the primary farmer of the operation as his two brothers are also pharmacists in Algona. (APP-459-461, Tr. 1328-1330). Tim inherited a significant amount of his farming operation from his family. (APP-368-372, Tr. 721-725). W.E. and D.E. have spent their entire lives on the Erpelding family farm. (APP-171-172, Tr. 78-79).

Jodi has been employed with the Iowa State Education Association for a majority of the marriage. (APP-141, Tr. 44). When she originally took the position, her employment began in Algona. (APP-142, Tr. 45). Eventually her office was consolidated and she was required to commute to Emmetsburg. (APP-142, Tr. 45). In 2010, her office was transferred again to Clear Lake, Iowa. (APP-142, Tr. 45). This resulted in a commute of approximately 45 miles from the family farm. (APP-142, Tr. 45).

Shortly after W.E. was born, he developed a respiratory issue and his pediatrician ultimately recommended W.E. not be placed in a daycare setting. (APP-172, Tr. 79). Tim and Jodi then came into contact with Ellen Gatton. (APP-501, Tr. 1631). Mrs. Gatton was a recent retiree who was not fond of staying home alone with nothing to do. (APP-501, Tr.1631). Shortly after meeting with Tim and Jodi, it was decided that Mrs. Gatton would provide nanny service to W.E. and eventually D.E. (APP-501-503, Tr. 1631-1633). It was originally discussed that Mrs. Gatton would provide in-home nanny services to W.E., but she had just built a new sunroom

off of her home and it was decided that W.E. would be dropped off at her house. (APP-503, Tr. 1633). Jodi would typically do the drop offs and pick-ups. (APP-504, Tr. 1634). However, as Tim was only three (3) miles away, he would drop in and have dinner with W.E. during the day. (APP-504, Tr. 1634). Mr. Gatton retired soon after and also shared in the duties. (APP-487, Tr. 1587).

When the boys reached school age, Jodi was leaving for work at approximately 6:45 a.m. and Tim was beginning the early morning farming operations, Mrs. Gatton would come to the Erpelding farm and get the boys ready for school. (APP-505-506, Tr. 1640-1641; APP-263, Tr. P. 215). She was eventually hired to provide some maid cleaning services for the Erpeldings as well. (APP-264-265, Tr. 216-217). At this point, Mrs. Gatton had effectually morphed into a proverbial "Alice"[1] of the Erpelding Bunch.

However, the Gattons eventually grew quite close to W.E. and D.E. (APP-508, Tr. 1644). In addition to providing daycare type services to the Erpeldings, the Gattons would attend many of the boys' social activities (i.e. birthday parties and church events) and extracurricular activities. (APP-507-510, Tr. 1643-1646). They also helped foster a relationship between the boys and the great outdoors. (APP-488-491, Tr. 1588-1591). Mr. Gatton took W.E. on his first hunting trips for deer

[1] Alice Nelson was the live-in housekeeper on the popular television show "The Brady Bunch."

and turkey. (APP-412-414, Tr. 918-920). Mrs. Gatton was active in trapshooting and W.E. has shown a love for the sport and is now actively pursuing independent and school-sponsored trapshooting clubs. (APP-492-495, Tr. 1597-1600). Given his younger age, D.E. has not been as involved, but has expressed early interests in these same activities. (APP-491, Tr. 1591). The Gattons would also take the boys on trips and vacations, sometimes with Tim and/or Jodi and sometimes without. (APP-495-497, Tr. 1600-1602).

As the boys grew into school age, they were both enrolled in the Bishop Garrigan parochial school system. (APP-256-259, Tr. 206-209). The boys both excelled in this environment and had many friends. (APP-256-259, Tr. 206-209). They were active in many athletic events and their local catholic church. (APP-462, Tr. 1333). They also have begun to show an interest in the farming operation. (APP-374, APP-403-404, Tr. 831, 906-907). W.E. has started to perform field work, including driving tractors, walking beans and picking up rocks. (APP-374-380, Tr. 831-837). Similarly, D.E. has begun to express some interest and— while being somewhat limited in his age—has engaged in similar activities. (APP-381-382; APP-402, Tr. 838-839; 904). Both boys have previously engaged in bottle feeding calves and have expressed a desire for Tim to get cattle again in the future. (APP-403-404, Tr. 906-907).

After some time in couple's therapy, Jodi eventually determined that they had irreconcilable differences and sought these dissolution proceedings. (APP-164-165, Tr. 67-68). In the months leading up to the divorce, Jodi had a heart attack and while she made a full recovery, she determined that this was the event that ultimately helped push her over the edge to seek these dissolution proceedings. (APP-164-165, Tr. 67-68). After a particularly contentious meeting with Tim and his attorney, Jodi (without Tim present) notified the boys of the impending divorce. (APP-383-386, Tr. 842-845; APP-351-352, Tr. 617-618). This was against the parties' previous agreement to jointly notify the kids. (APP-383, Tr. 842). Tim spent a few nights staying with his sister while Jodi remained on the family farm. (APP-386, Tr. 845). However, Tim eventually moved back to the family home and purchased a home for Jodi in Clear Lake at Jodi's request. (APP-194-196, Tr. 102-104).

Jodi continued to work in Clear Lake, so the move eliminated her daily commute. (APP-196, Tr. 104). Additionally, Jodi is romantically involved with a co-worker and recent divorcee, Jason Enke. (APP-248-251, Tr. 192-195). Jodi originally testified that he was merely a "social friend", but eventually she admitted that he has spent numerous overnights at her house. (APP-219, Tr. 140; APP-252, Tr. 196). Mr. Enke also lives in Clear Lake, about a mile from Jodi's residence. (APP-251, Tr. 195). Importantly, Jodi's move to Clear Lake placed her outside of the Bishop Garrigan school system. (APP-207, Tr. 127).

At the time of the separation—February 2015—Jodi and Tim agreed to a joint care arrangement that included an informal agreement that both boys would remain in the Bishop Garrigan school system. (APP-592, Exhibit 21). However, this was unsuccessful as the 2015/2016 school year approached. (APP-391-392, Tr. 878-879). On the eve of a temporary matters hearing, Jodi and Tim mediated the matter and arrived to a split custody arrangement. (APP-686, Exhibit 301; APP-391-392, Tr. 878-879). This is the arrangement that remained in place until the district court's order in July of 2016. (APP-082, Decree).

Prior to their marriage, Jodi and Tim entered into a premarital agreement. (APP-675, Exhibit 101). Both parties had attorneys who provided input to the agreement and it was signed a mere few days prior to their marriage in 1997. (APP-158-162, Tr. 61-65). At the time of the marriage, Tim had a net worth of $528,896 and Jodi had a net worth of $40,900. (APP-420, Tr. 1151). During the parties' eighteen-year marriage, Jodi and Tim strictly adhered to the terms of the premarital agreement with two exceptions as discussed in the Court's decree. (APP-094, Decree P. 13).

Many additional relevant facts are discussed within the Argument section, *infra*.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED JODI'S REQUEST FOR ADDITIONAL ALIMONY AND FOLLOWED THE TERMS OF THE VOLUNTARILY CONTRACTED PREMARITAL AGREEMENT IN DIVIDING THE MARITAL ASSETS.

Preservation of Error: Tim agrees that Jodi preserved error regarding her request for reimbursement alimony and the enforcement of the premarital agreement.

Standard of Review: Tim agrees the standard of review in dissolution of marriage cases is *de novo*. Iowa R. App. P. 6.907.

Discussion: The district court correctly denied Jodi's request for reimbursement alimony because this was not a marriage of short duration devoted almost entirely to Tim's educational advancement. Jodi's assertion that reimbursement alimony should apply to marriages where the parties acquire farmland is not supported by any precedent in the State of Iowa or anywhere else in the country. Jodi alternatively argues that if this Court does not award $600,000 in reimbursement alimony, she should have an increase in her traditional alimony award. Finally, Jodi argues that if she does not receive reimbursement alimony or a significant increase in her traditional alimony, *then* the premarital agreement then becomes unconscionable and she should be awarded an extra $600,000 in assets through the property division. Like reimbursement alimony, these claims were correctly considered and ruled upon by the district court. The district court awarded

Jodi an appropriate amount of traditional alimony and followed the law by honoring the terms of the premarital agreement. Because the district court carefully considered the facts and circumstances of this case, including the premarital agreement, this Court should affirm the district court's ruling which denied Jodi reimbursement alimony, awarded Jodi $1,166 per month in traditional alimony, and followed the terms of the premarital agreement in dividing the marital assets and liabilities.

A. Reimbursement Alimony is for Marriages of Short Duration Which are Devoted Almost Entirely to the Educational Advancement of One Spouse Which Yields Few Tangible Assets.

The concept of reimbursement alimony was first denominated in *In re Marriage of Francis*. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004) (citing *Francis*, 442 N.W.2d 59 (1989)). Although *Francis* was the first Iowa case to use the phrase "reimbursement alimony," the concept developed about a decade earlier. In 1978, the Iowa Supreme Court "held that an advanced degree or professional license is not in and of itself an asset for property division . . .", but "the future earning capacity flowing from such degree or license is a factor to be considered in the division of property and the award of alimony." *Id.* at 185 (discussing *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978)). As the concept of reimbursement alimony developed, the Court clarified that "for marriages of ***short duration which are devoted almost entirely to the educational***

advancement of one spouse and yield the accumulation of few tangible assets, alimony—rehabilitative, reimbursement, or a combination of the two—rather than an award of property, furnishes a fairer and more logical means of achieving the equity sought under *Horstmann* and its progeny." *Id*. (emphasis added). Reimbursement alimony is not subject to modification or termination except upon the recipient's death. *In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991) (citing *Francis*, 442 N.W.2d at 64).

Iowa courts have evaluated the appropriateness of reimbursement alimony on several occasions. In *Probasco*, the Court declined to award reimbursement alimony to the wife. 676 N.W.2d at 184. The Court explained the facts which militated against reimbursement alimony included: (1) "[t]he marriage was not one of short duration devoted almost entirely to the educational advancement of one spouse . . . "; (2) the wife was "a very competent and business-minded person with great opportunity for career success"; (3) it was "not a case where the parties [had] little or no net worth resulting in a case where the 'supporting' spouse receives little or nothing by way of a property settlement whereas the other spouse [had] a substantial earning capacity"; and (4) the wife left the marriage with a net worth in excess of $800,000, including an unencumbered home and car, and very little debt. *Id.*

In another reimbursement alimony case, the Court of Appeals held "[t]he record does not support an award of either reimbursement or rehabilitative alimony.

[The wife] has been compensated for the contributions she made to [the husband]'s earning capacity as a result of the comfortable lifestyle she enjoyed during their twenty-seven-year marriage and the amount of property she received." *In re Marriage of O'Rourke*, 547 N.W.2d 864, 867 (Iowa App. 1996) (citing *Francis*, 442 N.W.2d at 62). Iowa case law clearly defines the purpose of reimbursement alimony, and the district court correctly found Jodi is not entitled to reimbursement alimony under the facts and circumstances of her marriage to Tim.

B. The District Court Correctly Determined Jodi is Not Entitled to Reimbursement Alimony as the Eighteen Year Marriage was Not Devoted Entirely to Tim's Educational Advancement and the Parties had Substantial Assets to Compensate the Parties for their Contributions to the Marriage.

In this case, the district court correctly ruled that Jodi was not entitled to reimbursement alimony. Jodi argues that the "District Court misinterpreted the law in failing to award Jodi reimbursement alimony" because it found that Tim benefited from Jodi's efforts during the marriage which freed up cash for the accumulation of assets. (Appellant's Brief, p. 20). However, that is not the standard and the district court correctly examined the factors described in Section I.A, *supra*. The district court correctly explained "that in a marriage of long duration, sacrifices and contributions made by the parties to the marriage can best be adjusted fairly and equitably with a property division." (APP-113, Decree P. 32).

Just as in *Probasco*, the marriage between Jodi and Tim was not one of a short

duration devoted almost entirely to the educational advancement of one spouse; the parties were married in December 1997, separated in January 2015, and the Decree was entered in July 2016. (APP-083, Decree P. 2). In addition to the length of marriage weighing against reimbursement alimony, this was not a case where the parties had little or no property to be divided; even with the restrictions of the premarital agreement, Jodi was awarded $810,334 in assets. This award included an interest in the Thill farm valued at $262,500 with an option to cash that out, as well as the Clear Lake House valued at $310,000, a $45,000 vehicle, and over $165,000 in retirement assets; importantly, she was assigned no marital debt. (APP-122-124, Decree P. 41–43). In addition to the substantial property, Jodi was awarded $1,166 per month in traditional alimony. (APP-116, Decree p. 35). The district court, correctly applying Iowa law, found that the grounds did not exist to award Jodi reimbursement alimony, and following that law, declined to award it.

Perhaps acknowledging that reimbursement alimony does not apply to her circumstances under the current case law, Jodi tries to stretch its purpose, arguing "[a]n award of reimbursement alimony should not be limited to only those situations involving professional degrees. To hold otherwise would elevate the divorce rights for farmers over those of persons with professional degrees." (Appellant's Brief, p. 22). Jodi fails to cite any persuasive authority, much less binding authority to support her assertion that "Iowa case law or an interpretation of existing case law

does not support granting farmers such a privileged status." (Appellant's Brief, p. 22). This bold proclamation has no justification and misses the point the reimbursement alimony is awarded because education is not property, and the benefits of an education cannot be divided though a property distribution.

Jodi's unsupported assertion that reimbursement alimony should be stretched beyond situations where the marriage is devoted almost entirely to the educational advancement of one spouse not only shows her failure to understand the purpose and applicability of reimbursement alimony, but is directly controverted by the case law of this state and across the county. As discussed, *supra*, "for marriages of ***short duration which are devoted almost entirely to the educational advancement of one spouse and yield the accumulation of few tangible assets***, alimony—rehabilitative, reimbursement, or a combination of the two—rather than an award of property, furnishes a fairer and more logical means of achieving the equity sought under *Horstmann* and its progeny." *In re Marriage of Probasco*, 676 N.W.2d 179, 186 (Iowa 2004) (emphasis added).

The genesis behind reimbursement alimony is not the efforts of the supporting spouse, but the fact that there has not been enough time for the parties to receive the benefit from the advancement through tangible assets accumulated during the marriage. That is why Iowa courts have rejected reimbursement alimony in lengthy marriages where the educational advancement produces marital assets. *See, e.g.*, *In*

re Marriage of Anliker, 694 N.W.2d 535 (Iowa 2005); *Probasco*, 676 N.W.2d 179; *In re Marriage of O'Rourke*, 547 N.W.2d 864, 867 (Iowa App. 1996); *In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991) (declining to award reimbursement alimony because both parties contributed to the success of the family unit and were rewarded with financial success). Jodi's unsupported invitation to vastly extend the purpose of reimbursement alimony is not supported by Iowa law.

C. Jodi's Claim that Reimbursement Alimony Should Apply to Marriages that Acquire Farmland is Not Supported by any Precedent in Iowa or Any Other State in the Country.

Jodi's unsupported assertion that reimbursement alimony should be expanded beyond educational advancements is also in contradiction to holdings in other states. Pennsylvania determined reimbursement alimony is for situations that do not involve acquisition of property, finding "most jurisdictions that have considered the question have concluded that neither an advanced degree nor increased earning capacity is actually 'property.'" *Lehmicke v. Lehmicke*, 489 A.2d 782, 784 (Penn. 1985). The Colorado Supreme Court states that:

> [An educational degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money.

In re Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978). West Virginia, like Iowa,

has held that "not every person who contributes to the education of a spouse is entitled to reimbursement alimony . . . the supporting spouse in a marriage of many years should be compensated in the division of marital property." *Hoak v. Hoak*, 370 S.E.2d 473, 479 (W. Va. 1988). Courts in Minnesota have gone even further, creating a mathematical formula, where reimbursement alimony is limited based on the amount of the working spouses financial contributions and the educational costs. *DeLaRosa v. DeLaRosa*, 309 N.W.2d 755, 759 (Minn. 1981). Notwithstanding the factors such as the length of the marriage and Jodi's award of over $810,000 in assets with no debt, a farming operation should never be subject to reimbursement alimony. There is no authority anywhere in the country to expand reimbursement alimony to the expansion of farm, this argument must fail. Further, there is no reason to do it in this instance. There was a valid marital agreement which divided the property. Instead, it is clear that Jodi is simply trying to circumvent the premarital agreement under the guise of reimbursement alimony.

D. The District Court Awarded a Fair Amount of Traditional Alimony Considering the Needs of the Parties, the Parties Standard of Living During the Marriage, and Tim's Fluctuating Income.

Jodi argues that if this Court finds reimbursement alimony is not appropriate under these facts and circumstances, she should have a "significant increase of her award of lifetime traditional alimony" and suggests $2,200 would be appropriate. (Appellant's Brief, p. 26). Spousal support "is not an absolute right, and an award

thereof depends upon the circumstances of a particular case." *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012)(quoting *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005)). "In deciding whether to award alimony, the court must consider the earning capacity of the parties, the present standard of living, and the payor's ability to pay balanced against the needs of the recipient spouse." *In re Marriage of Wattonville*, 2012 WL 1439241 (Iowa App. 2012)(citing *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996)). "If both parties are in reasonable health, they need to earn up to their capacities in order to pay their own bills and not unduly lean on the other party for support." *Id.* (citing *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988)).

If alimony is awarded, the appropriate amount of support is calculated based upon the factors listed in Iowa Code section 598.21A(1), including: "(1) the length of the marriage, (2) the age and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking alimony, and (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage." *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007)(citing Iowa Code § 598.21A(1)(*a*)-(*f*)).

When a person's income fluctuates, the court must average the person's

income over a reasonable period of years. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 53 (Iowa 1999). In this case, the district court relied on witness Ryerson's analysis in Jodi's Exhibits 53 and 54 to find that Tim's six-year average for Tim's income was $149,799. (APP-114, Decree, P. 33). The district court also considered the testimony of Tim's tax preparer, who stated Tim was projected to have a tax loss of $148,223. (APP-316, Tr. 364; APP-683, Exhibit 103). However, the district court ultimately discounted the projected tax loss because Tim received a stepped-up basis in inherited farm machinery and equipment and took "significant sums of depreciation on equipment he did not pay for. The Court thinks his actual cash loss will thus be much less than his tax loss." (APP-316, Tr. 364; APP-115, Decree, P. 34). Although the Decree is silent as to how the district court arrived at the $125,000 estimate for Tim's income, simple math would lead to the conclusion that the district court credited Tim with a cash loss of approximately $23,794 to arrive at the $125,000 income figure. The district court acknowledged "the historic high prices reflected in recent past years, may not return soon" when arriving at the $125,000 income determination. (APP-114, Decree P. 33).

Jodi asserts "Tim's monthly income is $8,145.40 and Jodi's is $2,887.26." (Appellant's Brief, p. 26). However, Tim's monthly income is actually $6,805.02

according to the district court's determination of $125,000 per year.[2] Making that correction, when the alimony payment is factored in, Tim's monthly income would be $5,639.02 and Jodi's would be $4,053.26 with the current alimony award. This calculation does not include child support, which Jodi is currently awarded at a rate of $741.58 per month. Notably, Jodi does not advance any argument specifically examining the factors listed in Iowa Code section 598.21A(1); she simply asserts "an increase in traditional alimony is justified." It is important to consider that the district court set this alimony (and Tim's monthly income) by averaging income that included historically-high crop prices. As acknowledged by Jodi's witness Alan Ryerson, even when making the depreciation adjustment, Tim's farm income was only $66,952 for the year 2013 and he lost $159,717 in the year 2014. (APP-630, Exhibit 53). There was also testimony that Tim will essentially be living on borrowed money as his farm income is not expected to increase in the next few years. (SUPP-APP 101-102, Tr. 1458-1459) Jodi was employed at the ISEA throughout the marriage, and was awarded over $810,000 in assets, including an unencumbered home and vehicle. Applying all of the relevant factors, the district court's award of traditional alimony was appropriate under the circumstances of this case.

[2] The district court appears to have erroneously run the Child Support Guidelines (Docket Entry #68) with Tim's income at $150,000 as opposed to $125,000. Tim's net monthly income on the Guideline authored by the district court is listed at $8,145.50.

E. The District Court's Application of the Prenuptial Agreement was Not Unconscionable Simply Because Jodi Did Not Get as Much Money as She Wanted.

It is clear that Jodi wants an additional $600,000 from the marriage, regardless of whether there is any legal basis for the request. Jodi's catchall is that if the Court does not award her $600,000 in reimbursement alimony or nearly doubles her monthly traditional alimony—which based on her lifetime expectancy would increase her payment by $462,000—*then* the prenuptial agreement is unconscionable. (APP 614, Exhibit 52). This argument ignores the Iowa Uniform Premarital Agreement Act ("IUPAA") and Iowa case law. The district court poignantly found

> [Jodi] admits execution of the agreement. She contends the agreement should be reformed based upon mutual mistake . . . . Notably absent from the contentions advanced by the parties in their pre-trial stipulation, in giving their testimony, and in their trial and post-trial briefing, is ***any claim that the agreement was not executed voluntarily, that it was unconscionable when executed, or that a fair and reasonable disclosure of property was not made***. Further, it was not claimed, and no evidence would support, that either of the parties ever took any action to revoke the premarital agreement.

(APP 091, Decree, p. 10) (emphasis added).

"As a general rule, premarital agreements are favored and should be construed liberally to carry out the intention of the parties." *In re Marriage of Schultz*, 2011 WL 3480971 at *2 (Iowa App. Aug. 10, 2011) (citing *In re Marriage of Christensen*,

543 N.W.2d 915, 918 (Iowa App. 1995)). Prenuptial agreements in Iowa are governed by the IUPAA. Iowa Code §596.3. Premarital Agreement enforcement is explained in Iowa Code section 596.8, which provides:

> A premarital agreement is not enforceable if the person against whom enforcement is sought provides any of the following:
>
> a. The person did not execute the agreement voluntarily.
>
> b. The agreement was unconscionable ***when it was executed***.
>
> c. Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse.

(emphasis added).

Jodi cites *In re Marriage of Shanks* to support her proposition that a court may set aside or modify a pre-nuptial agreement on the grounds that it is unconscionable. (Appellant's Brief, p. 27). However, in *Shanks*, the Court wrote "[a]t the outset, we acknowledge premarital agreements are typically financially one-sided in order to protect the assets of one prospective spouse. Courts ***must resist the temptation to view disparity between the parties' financial circumstances as requiring a finding of substantive unconscionability***." 758 N.W.2d 506, 516 (Iowa 2008)(citing *Adams v. Adams*, 278 Ga. 521, 603 S.E.2d 273, 275 (2004) ("that the antenuptial agreement may have perpetuated the already existing disparity between the parties' estate does not in and of itself render the agreement unconscionable when, as here, there was

full and fair disclosure of the assets of the parties prior to the execution of the agreement, and Wife entered into the agreement fully, voluntarily, and with full understanding of its terms after being offered the opportunity to consult with independent counsel.”))(emphasis added).

Examining Jodi’s own expert report—which had considerable flaws that favored Jodi’s position—Jodi’s aggregate salary during the marriage was $601,025, with an after-tax present value of $575,910. (APP-614, Exhibit 52, Appx 3). Jodi’s Net Worth Statement attached to the Premarital Agreement showed she had a total net worth of $40,900.00. (APP-584, Exhibit 19, Schedule B). Given that she received over $810,000 in assets under the Decree, Jodi received over nineteen and a half times the amount of assets she brought into the marriage. Taking Jodi’s numbers at face-value, if she was returned all of the wages, she not only received all of the money she contributed to the family back, but was awarded an additional $193,000 plus life-long alimony in the amount of just under $14,000 per year.

Under the facts of this case, the Court cannot simply look at the assets each of the parties were awarded and say it is unconscionable because Tim was awarded more property. Even if the prenuptial agreement were not in place, Tim still would have received a substantial portion of the assets due to their acquisition through gifts and inheritance. Tim was gifted a 1/6 interest in KEE Livestock and Gravel, a 47/54th interest in the “Home Place” farm subject to his father’s life estate, and

inherited: a 1/18th interest in the "Home Place" farm from his mother's estate (received prior to the marriage), 1/3 interest in Estate Machinery, a 1/3 interest in grain which was used to purchase a 1/3 interest in the Clausen farm and a 1/2 interest in the Burlingame farm. Tim's gifted and inherited assets total $3,538,321. (APP-614, Exhibit 52).

Removing the gifted and inherited property from Tim's side of the equity and accounting for his $944,454 in liabilities, Tim actually received $3,581,499 in marital assets. Although Ryerson believed Tim's premarital net worth was $327,106, he did not know—and therefore did not factor in—that the bank's practice was to keep the balances on the farms' land value at the purchase price, rather than the fair market value. (APP-147, Tr. 50; APP-311, Tr. 300). Correcting that flaw, Tim came into the marriage with $528,896 in assets, Tim recognized just under a 6.7-fold return on his premarital property, whereas Jodi received over 19.5 times the assets she brought into the marriage with no liabilities. (APP-420, Tr. 1151).

The district court correctly honored the terms of the voluntarily-contract premarital agreement entered into by the parties. There was no dispute that the agreement was not voluntary, that it was not unconscionable when it was signed, or that the parties did not make a fair and reasonable disclosure before signing the agreement. Further, even under the terms of the premarital agreement, Jodi received substantial assets and no liabilities from the marriage. The district court's denial to

set aside the premarital agreement should be affirmed by this Court.

II. THE DISTRICT COURT CORRECTLY DENIED JODI'S REQUEST FOR ATTORNEY FEES AND SHOULD NOT HAVE AWARDED JODI TEMPORARY ATTORNEY FEES.

Preservation of Error: Tim agrees that Jodi preserved error regarding her request for attorney fees.

Standard of Review: Tim agrees the standard of review regarding attorney fees is for an abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). "An abuse of discretion occurs when the district court exercises its discretion "on grounds or for reasons that are clearly untenable or to an extent clearly unreasonable." *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012) (citing *State v. Nelson*, 791 N.W.2d 414, 419 (Iowa 2010); *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id.* (citing *Graber v. City of Ankeny*, 616 N.W.2d 633 638 (Iowa 2000)).

Discussion: A party to a dissolution does not have a right to an award of attorney fees; rather the district court uses its discretion to determine whether an award is appropriate. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees and the fees must be fair and reasonable." *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). The district court held that

under the terms of the premarital agreement, the parties waived their right to attorney fees. Although Jodi argues that public policy should void this provision of the agreement, the IUPAA does not prohibited waiver of attorney fees and the district court correctly interpreted the law. Iowa Code section 596.5 provides:

> 1. Parties to a premarital agreement may contract with respect to the following:
>
> a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
>
> * * *
>
> c. The disposition of property upon separation, dissolution of the marriage, death or the occurrence or nonoccurrence of any other event.
>
> * * *
>
> g. Any other matter, including the personal rights and obligations of the parties, not in violation of public policy or a statute imposing a criminal penalty.
>
> 2. The right of a spouse or child to support shall not be adversely affected by a premarital agreement.

In her Brief, Jodi argues that "[n]either alimony, custody, nor child support can be circumscribed by a pre-marital agreement. Iowa Code § 596.5." (Appellant's Brief, p. 29). The Supreme Court has held "[t]he legislature may express its intent by the omission, as well as the inclusion of terms. In other words, when the legislature expressly mentions one thing, it implies the exclusion of other things not specifically mentioned." *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 859 (Iowa 2010) (citing *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008)); *see also De Stefano*

v. Apts. Downtown, Inc., 879 N.W.2d 155, 183 (Iowa 2016); *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002). Although the legislature had the opportunity to prohibit clauses in a premarital agreement that restrict payment of attorney fees when child custody is at issue, the legislature did not do so.

Jodi argues that the district court should have bailed her out of her voluntary waiver of attorney's fees in the premarital agreement. Although there are no Iowa cases directly on point when children are involved, the Court of Appeals has reversed a district court which awarded attorney fees in spite of a prenuptial waiver. In the case of *In re Marriage of Van Horn*, the Court of Appeals reversed a district court award of attorney fees where the parties waived their right to attorney fees in the event of a dissolution of marriage in their prenuptial agreement. 2002 WL 142841 at *4 (Iowa App. 2002) ("The agreement clearly precludes the award of attorney fees. As such, that award was in error, and we modify to eliminate it."). Although there are no Iowa cases on point, the South Carolina Supreme Court has held "[w]e concur with the majority of jurisdictions which hold prenuptial agreements waiving alimony, support and attorney's fees are not *per se* unconscionable, nor are they contrary to the public policy of this state." *Hardee v. Hardee*, 355 S.C. 382, 388, 585 S.E.2d 501, 504 (2003).

The Iowa Supreme Court has stated, "[i]n the absence of instructive Iowa legislative history, we look to the comments and statements of purposed contained

in the Uniform Act to guide our interpretation of the comparable provisions of the IUPAA. *In re Marriage of Shanks*, 758 N.W.2d 506, 512 (Iowa 2008). Under the Uniform Premarital Agreement Act, after which Chapter 596 was modeled, the Model Section regarding enforcement of a premarital agreement explains that if a party does not have independent legal representation at the time they signed the agreement, the unrepresented party must be given a notice of waiver of rights, "substantially similar to the following . . . 'If you sign this agreement, you may be: . . . Giving up your right to have your legal fees paid.'" UNIF. PREMARITAL AGREEMENT ACT §9(c). This shows that the intent of the Uniform Act was to allow parties to waive their right to attorney fee claims in the event of a dissolution. As Iowa's adoption of the model code does not specifically prohibit a premarital ban on attorney fee claims, the district court's ruling should stand.

Tim acknowledges that there are a few states where state courts of appeals have found a premarital agreement prohibiting attorney fees awards are not enforceable as to issues of child custody. *See, e.g. In re Marriage of Best*, 901 N.E.2d 967, 971 (Ill. App. 2009). Jodi cites a South Dakota case where the court found that because alimony is not waivable, attorney fees in seeking alimony likewise should not be waivable under a premarital agreement. In Illinois, there is a *per se* rejection of premarital agreements that impair child-support rights or specific custody. *In re Marriage of Nuechterlien*, 287 N.E.2d 21 (Ill. App. 1992). The

Illinois Court of Appeals examined other states, and found the Colorado Supreme Court rejected fee-shifting bars that "could harm the children by substantially impairing the lesser-earning spouse's ability to effectively litigate the issues related to the children, which would in turn, negatively impact the court's ability to assess the best interest of the children." *In re Marriage of Best*, 901 N.E.2d 967, 971 (Ill. App. 2009) (quoting *In re Marriage of Ikeler*, 161 P.3d 663 (Colo. 2007) (internal quotations omitted). Illinois ultimately held that fee-shifting bars on child-related issues violated public policy, but noted "[i]n Illinois, the party seeking an award of attorney fees must establish his or her inability to pay and the other spouse's ability to do so." *Id*. at 972. This importantly differs from the Iowa standard, which requires the court to consider the respective abilities to pay, rather than placing a burden on the party requesting fees to establish an inability to pay.

If the court does decide to follow the minority of states which hold a premarital agreement prohibition on attorney fees relating to alimony and child support violate public policy, the Court should then find that such restrictions are voidable as applied, rather than *per se* void. This case is a good example of why if the voluntarily-contracted restriction is against public policy, it should only be voidable. If the rationale behind the public policy argument is that it would be unfair to hinder the lesser-earning spouse's ability to effectively litigate the issues—that is not the case with Jodi and Tim.

Here, Jodi received over $810,000 in assets and no liabilities, as well as substantial alimony and child support. She did not demonstrate an inability to pay her attorney fees, but merely wants to have Tim pay anything she can get the court to order. Further, as discussed in Section I. D, *supra*, Tim had depreciation-adjusted income for 2013 of only $66,952; he lost $159,717 in 2014, and an expected loss of $148,223 on his 2015 taxes. (APP-630, Exhibit 53). The evidence presented regarding crop prices indicated that Tim would likely be living on borrowed money for the next several years. (SUPP APP-101-102, Tr. 1458-1459). Unlike support and alimony considerations, it is not appropriate for the court to average years of income in determining ability to pay. As Tim's income will likely be negative for the next few years, he does not have a substantially superior ability to pay Jodi's fees in addition to his own.

Finally, public policy concerns that a party would not be able to effectively litigate the best interests of the children are not present in this case as the children's interests were fully represented by an appointed Guardian Ad Litem and Tim paid the entire fee ($9140.00) for the children's representation. (APP-121, Decree P. 40). Because Iowa law and the majority of jurisdictions do not prohibit fee-shifting bans in premarital agreements, this Court should affirm the district court's denial of awarding Jodi attorney fees. Further, this Court should reverse the district court's award of $20,000 in temporary fees to Jodi. *See Van Horn*, 2002 WL. 142841 (Iowa

App. 2002). Even if the Court follows the minority of jurisdictions and finds fee-shifting bans are against public policy when custody is at issue, the facts and circumstances of this case do not warrant a *per se* voiding of the attorney fee provision.

III. THE PARTIES SHOULD PAY THEIR OWN APPELLATE ATTORNEY FEES.

Preservation of Error: Tim agrees that Jodi preserved error regarding her request for appellate attorney fees.

Standard of Review: Tim agrees the standard of review regarding appellate attorney fees.

Discussion: "Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. Factors to be considered in determining whether to award attorney fees include: 'the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.'" *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (quoting *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993)). Tim asserts the parties should pay their own attorney fees.

IV. THE DISTRICT COURT ERRED IN NOT AWARDING TIM PRIMARY PHYSICAL CARE OF BOTH CHILDREN

Preservation of Error: The issue of whom should be awarded primary care was raised and presented before the district court. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a

fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review: Iowa Rule of Appellate Procedure 6.907 provides "Review in equity cases shall be de novo." Iowa R. App. P. 6.907.

Discussion: As in all cases involving the question of child custody, the Court's consideration in proceedings is always the best interest of the children. *In re Marriage of Junkins*, 240 N.W.2d 667 (Iowa 1976). The primary concern in determining primary physical care is the best interests of the children. Iowa Code § 598.1(7) (2013). The critical issue is determining which parent will do a better job raising the children; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa App. 2003)(citing *In re Marriage of Ullerich,* 367 N.W.2d 297, 299 (Iowa App. 1985)). The Court must decide which parent is able to minister more effectively to the children's wellbeing and in which home the child is more likely to reach healthy physical, mental, and emotional maturity, and provide greater structure and stability. *See In re Marriage of Courtad*, 560 N.W.2d 36 (Iowa App. 1996). In considering what custody arrangement is in the best interest of the children, the court considers statutory factors. *In re Sivesind*, 680 N.W.2d 379 (Iowa App. 2004) (citing Iowa

Code § 598.41(3) (2003)). All of these factors bear upon the "first and governing consideration" as to what will be in the best long-term interest of the children. *Id.* (citing *In re Marriage of Vrban,* 359 N.W.2d 420, 424 (Iowa 1984)).

A. The District Court Erred in Ordering a Split Physical Care Arrangement.

In this case, the district court awarded joint legal custody to Jodi and Tim, but ordered a split physical care arrangement with D.E. being awarded to Jodi and W.E. being awarded to Tim. (APP-119, Decree P. 38). The Iowa Supreme Court and the Iowa Court of Appeals have equally recognized the general disfavor to this type of a custodial arrangement. The Iowa Supreme Court has stated as follows regarding split physical care arrangements:

> There is a presumption that siblings should not be separated. *In re Marriage of Jones,* 309 N.W.2d 457, 461 (Iowa 1981). We have long recognized that split physical care is generally opposed because it deprives children of the benefit of constant association with one another. "The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children." *In re Marriage of Jones,* 309 N.W.2d 457, 461 (Iowa 1981). Good and compelling reasons must exist for a departure.

In re Marriage of Will, 489 N.W.2d 394, 398 (Iowa 1992). To aid in determining whether good cause exists to award the extreme arrangement of split physical care, the Iowa Supreme Court has provided a number of factors to consider. These include the age differences between the siblings, if the children would have remained together but for a split physical care arrangement, the children's relationships with

each other and "the likelihood that one of the parents or children would turn other children against the other parent." *Id.* In this case, each of these factors points against an award of split physical care.

First, the age difference between the children is not significant. W.E. and D.E. are approximately four and a half (4 ½) years apart. (APP-140, Tr. 43). They are five (5) grade levels apart. (APP-417, Tr. 1111). At the time of the trial, W.E. was starting his freshman year at Bishop Garrigan High School. (APP-417, Tr. 1111). D.E. on the other hand was starting fourth grade. (APP-417-418, Tr. 1111-1112). This age difference, while likely keep the boys from seeing each other in school, is not so significant that they will not be able to grow up together. *See generally, In re Marriage of Fynaardt*, 545 N.W.2d 890 (Iowa App. 1996) (reversing a split care arrangement where the children were eight (8) years apart). Similarly, as correctly recognized by the district court, the W.E. and D.E. would remain together if the Court were to deny the split care arrangement. (APP-102, Decree P. 21). Thus, the first two factors outlined in *Will*, point towards denying a split care arrangement.

Next, W.E. and D.E. clearly show a bond together. As recognized by many witnesses, they exhibit a typical brother relationship. (APP-358-359, Tr. 635-636). This includes, D.E. being very observant of his older brother and a desire to be involved in the same activities as him. For example, when W.E. started to exhibit his interests in the outdoors and trapshooting, D.E. began exhibiting those same

interests and would like to participate in the same way as his brother. (APP-491, Tr. 1591). Similarly, when W.E. was out picking up rocks in the field, he expressed an interest to help as well. (APP-401-402, Tr. 903-904). Tim also recognized that he would expect W.E. to express an interest in D.E. as he grew older and would expect him to continue to attend athletic events and school functions even after W.E. graduates from high school. (APP-409, Tr. 912). Accordingly, this factor also points to keeping the boys together.

The final factor is whether one of the parents or children will work to turn other children against a parent. *Will*, 489 N.W.2d at 398. It does not appear that either sibling appears to have the desire to turn one against the other or against either parent. No evidence was presented that signified either an atypical dispute between either brother or either parent. Instead, it is apparent that both children's relationship with their individual brother and with their parents were normal and neither party had great disdain for the other. The one exception is that W.E. was absolutely adamant that he did not want to move out of the current school system or off the family farm. (APP-080, GAL P. 19). Jodi refused to provide positive insight about this. Instead, she simply stated that if she was awarded primary care in Clear Lake, she would have an open conversation with him about moving his activities and schooling to the Clear Lake School System. (APP-207, Tr. 127). This lack of understanding of W.E.'s true desires and the practicalities of uprooting his

extracurricular and social activities would clearly create the potential for interfamilial strife.

On the other hand, Tim presented a clear plan for how he would reintegrate D.E. back into the Bishop Garrigan school system. He provided testimony from the Bishop Garrigan president/superintendent and D.E.'s former third grade teacher about how this process would occur. (APP-473-475, Tr. 1402-1404; APP-477-478, Tr. 1425-1426). Both recognized however, that because D.E. spent a number of years already in the system, his transition would be relatively easy. (APP-473-475, Tr. 1402-1404; APP- 477-478, Tr. 1425-1426). Additionally, Tim recognized that D.E. is still social and enjoys time with friends he made while attending Bishop Garrigan. (APP 406-408, Tr. 909-911). Thus, each of the factors delineated in *Will* establish that this is ***not*** the unique situation in which split care should be awarded. Instead, W.E. and D.E. should remain together.

B. The Guardian Ad Litem Report is Premised on Improper Considerations

In this case, a guardian ad litem was appointed to protect the interests of each child. Ultimately, the guardian ad litem came to the same conclusion as the district court and recommended split care. However, it is important to point out several flawed issues in his report. First, the report makes reference to the long established principle that the gender of either party is irrelevant in a custody determination. (APP 076, GAL P. 15); *see also In re Marriage of Ullerich*, 367 N.W.2d 297, 299

(Iowa App. 1985). However, in coming to his conclusions and recommendations to deny Tim custody of D.E. the guardian ad litem stated that "although a somewhat stodgy concept in modern society, many experts still feel children of tender years should be with their mothers." (APP-078, GAL P. 17). This is not only a "stodgy concept in modern society," it is outright not to be considered in making a custody decision for over thirty (30) years. *Ullerich*, 367 N.W.2d at 299.

Similarly, in denying primary care of D.E. to Tim, the guardian ad litem expressed a preference to Jodi's urban setting as a better environment for D.E. than Tim's rural setting. The Iowa Court of Appeals has consistently stated that the Courts "do not award custody by determining whether a rural or urban Iowa upbringing is more advantageous to a child." *In re Marriage of Aronow*, 737 N.W.2d 326 (Iowa App. 2007) (quoting *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993)). However, in his report the guardian ad litem stated that "[d]espite the mobility of the modern farmer, living in the country is still different from town life. D.E. has city sponsored sports and recreational activities available by a walk or bike ride and which are not as readily available when living on the farm." (APP-078, GAL P. 17). This again is an improper factor to be considered when making a custody determination.

Additionally, the guardian ad litem's report did not take into consideration the long-term considerations of D.E. in denying Tim primary care. The Iowa Courts

have long recognized that the "first and governing consideration" is a determination as to what will be in the best long-term interests of the children. *In re Sivesind*, 2004 WL 360605 at *2 (Iowa App. 2004) (citing Iowa Code § 598.41(3) (2003) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). In this case, the guardian ad litem recognized that there would very likely be a need to modify the split physical care arrangement in the future because D.E. may wish to enroll into Bishop Garrigan's middle school or high school in the future. (APP-080, GAL P. 19) ("At some point either middle school or more probably high school, he may decide the Garrigan environment is better for him. Strictly on the educational issue a switch in primary placement may be appropriate at that point."). This acknowledgement of the potential lack of long-term stability, is exactly what the guardian ad litem should be advocating against. It would be highly unlikely that D.E.'s simple desires to attend a different school would constitute a substantial change in circumstances to allow not only a modification, but a modification of primary care of D.E. Instead of thinking of D.E.'s short term goals and desires the guardian ad litem should have been looking to the best long-term goals and interests of the boys to promote stability in their lives. This long-term stability clearly lies with Tim and not Jodi.

Finally, it appears that the guardian ad litem simply puts too much weight in D.E.'s preference to live with his mother over his father. "When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his

or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining custody rights." *In re Marriage of Thielges*, 623 N.W.2d 232, 239 (Iowa App. 2000) (quoting *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa App. 1991)). "Deciding custody is far more complicated than asking children with which parent they want to live." *McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa App. 2010) (quoting *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa App. 1985)). Factors to be considered are "(1) the child's age and educational level; (2) the strength of the child's preference; (3) the child's relationship with family members; and (4) the reasons the child gives for his decision." *Id.*

In this case, it is important to note that neither W.E. nor D.E. testified in these proceedings and instead, the information was relayed through either testimony of Jodi or Tim, the Guardian Ad Litem's report and several other witnesses concerning their observations of the boys. In this case, D.E. was ten years old at the time of the report. (APP 417, Tr. 1111). By all accounts he is a bright and intelligent fourth-grade student. (APP 207, Tr. 127). He has exhibited a somewhat strong preference to live with his mother. (APP 079-080, GAL P. 18-19). However, this is not based upon any apparent dislike towards his father or any particular family member. Instead, D.E. "clearly misses the farm environment," enjoys seeing his father, misses his brother and desires to do extended visits on the farm. (APP-073, GAL P. 12). Further, when asked if he wanted to live with his father, he never outright denied the

possibility of such an event. (APP-073, APP-079-080, GAL P. 12, 18-19). In fact, initially "he seemed excited about the eventual Garrigan attendance." (APP-073, GAL P. 12). No real rationale was discussed to determine what reasons D.E. provided as to why he wanted to live with his mother over his father. Instead, it seems that the items discussed by the guardian ad litem of making new friends at the new city and being enrolled in activities such as baseball were the driving factors for D.E.'s preference. (APP-078, GAL P. 17). However, these types of wishes and desires carry little weight given his age and the apparent purposes of his desires. *See generally*, *Aronow*, 737 N.W.2d at 326 ("Although mature for their ages [10 and 8 years old] we conclude their preferences for Postville were not controlling."); *Thielges*, 623 N.W.2d at 239 (holding that when the decision is based more upon school preference and friends it is given little weight, especially when a separation of siblings is at stake). Thus, in recognizing the each of the significant flaws used to come to the recommendation of denying Tim primary custody of D.E., it is apparent that this report should be given little consideration.

C. The Split Care Arrangement is Not Working

In realizing how the parties started with a split care arrangement, a little background is necessary. A temporary matters hearing was originally scheduled for July 13, 2015, which would have addressed the custodial arrangements. (APP-010, Order Setting Temp Hearing). However, Tim's counsel was unavailable for serious

medical procedures (cancer surgery) on that date and time and the temporary hearing was continued to when school was set to begin on August 24, 2015. (APP-014, Order ReSetting Temporary Hearing). Tim testified that the reason for agreeing to the split care arrangement was the great uncertainty associated with the temporary matters hearing and the possibility that W.E. would not be enrolled in the Bishop Garrigan school system. (APP-207, Tr. 127). As recognized by the guardian ad litem and Tim, having W.E. enroll in the Clear Lake school system, was likely to cause severe issues and the potential that W.E. would refuse to attend school or worse. (APP-073, GAL P. 12; APP-395, Tr. 883). Accordingly, Tim made a grave decision that he greatly regretted, temporarily splitting his two children. (APP-392, Tr. 879).

The case then proceeded to trial on December 2, 2015 and was tried piecemeal over the next several months until it was completed on February 19, 2016. Over this time period, several observations were made regarding the status of the split care arrangement. First, Tim stated that he did not believe it was working. (APP-396, Tr. 893). He noticed that due to the traveling back and forth the boys seemed very tired. (APP-397-398, Tr. 896-897). For example, in the time it would take to drive from Clear Lake to Algona, D.E. would fall sleep in the car. (APP-397-398, Tr. 896-897). Additionally, the boys are simply not spending enough time together. Following the temporary matters stipulation, the boys were spending two nights

together during the week. (APP-686, Exhibit 301). However, the reality of the situation is that based upon the school schedules, the extracurricular activities schedules, and the amount of time spent driving between the two homes, the boys are only basically sleeping in the same location on many occasions. (APP-399-400, Tr. 900-901). Simply put the brothers are not spending any quality time together. Finally, as recognized by the Guardian Ad Litem, the brothers miss spending time with each other. (APP-072-073, GAL P. 11-12). This is not a situation where one brother has angst against the other or against a particular parent. Instead, the guardian ad litem recognized that the brothers have a bond with each other and that after only a couple of months of being apart, they both expressed missing the other. (APP-072-073, GAL P. 11-12).

These principles absolutely exhibit the problems with a split care arrangement and establish why there is a presumption against split physical care. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992) ("There is a presumption that siblings should not be separated."). This case simply does not warrant the split physical care of W.E. and D.E. Instead, this case is a somewhat standard case in which the boys should not be split between the parents and liberal visitation should be awarded to the noncustodial parent. *See e.g., In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa App. 1996) ("We do not find Gene and Jil's situation to be so rare to require a deviation of the strong policy of courts to avoid splitting custody of the children.").

Accordingly, this Court should reverse the district court's split physical care arrangement.

D. This Court Should Award Tim Primary Care of Both Children

Jodi does not and now cannot appeal the split physical care determination in this matter. Iowa R. App. P. 6.903; *see also, Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) ("However, we have long held that an issue cannot be asserted for the first time in a reply brief."). Thus, Tim asserts that because the split physical care arrangement was improper, he should be awarded primary care of W.E. and D.E. Additionally, during the course of the trial, Tim affirmatively established that Tim ***should*** be awarded primary care of D.E. and W.E. On the other hand, Jodi's actions leading up to the filing of the dissolution and during the pending of the dissolution proceedings exhibit that she should not have been awarded primary care of either child.

First, Jodi showed a history of placing her needs above the needs of her children. The most glaring example of this is her decision to move away from the Algona area and out of the Bishop Garrigan School District. Jodi, based on her own decision to "create space between Tim and [herself]" elected to move from Algona to Clear Lake. (APP-194-196, Tr. 102-104). This put her closer to the job she had had for several years. (APP-194-196, Tr. 102-104). Conveniently, the house that she had Tim pay for was located only a mile from her current paramour, Jason Enke.

(APP-251, Tr. 195). Jodi stated that it was her desire to never relinquish physical care from her children by moving into an entirely new location, however, the reality is that is exactly what has occurred. (APP-196-197, Tr. 104-105). This key and crucial decision to satisfy her own desires to be closer to work without having the foresight of what effect it may have on her request for primary care of the children calls into question her ability to put D.E.'s (and W.E.'s) needs ahead of her own. Simply put, if Jodi had a true desire to continue a stable environment for the children, to be realistically considered for primary care of the children and make an effort to not disrupt their lives, she should have remained in the same community as the boys. This would have allowed them to continue to be enrolled in the same school system and maintain the same support system. Instead, she chose the convenience of living close to her work (despite making that drive for a number of years) and her "social friend" Jason Enke.

Similarly, prior to the parties divorce, Tim and the Gattons arranged to take the boys to a vacation in South Dakota. (APP-178, Tr. 85). As it turned out Tim was unable to attend the vacation due to farming needs that had arisen. (APP-178, Tr. 85). When planning the trip, it was expected that Jodi would attend with the boys, but instead she expressed a desire to stay home to attend her twenty-fifth class reunion. (APP-178, Tr. 85). It would have been reasonable and acceptable if Jodi needed to miss the trip as a result of her duties at work, but that was not the case.

(APP-178, Tr. 85). Instead she showed a serious lapse in judgment in choosing to attend a social endeavor rather than spending time on a vacation with her children.

A similar event occurred just prior to her filing in the divorce proceedings. The Erpeldings are avid Green Bay Packer fans. For D.E.'s birthday, Tim had arranged for the entire family to attend a Monday Night game in Green Bay, Wisconsin. (APP-340-341, Tr. 489-490). Jodi eventually elected to not attend the game because at that time the divorce was a foregone conclusion in her mind and she did not want to spend the time with Tim or presumably the boys. (APP-341-342, Tr. 490-491). So on the Saturday night leading up to the game, the family attended a Saturday evening mass and then had a joint family dinner to celebrate D.E.'s birthday. (APP-341, Tr. 490). After returning to the family home, Jodi left to attend some event in Clear Lake. (APP-341-342, Tr. 490-491). Interestingly, around the time of her departure for Clear Lake she had a telephone call with her paramour, Jason Enke. (APP-343-345, Tr. 495-497). That night Jodi never returned home and instead scheduled to meet the family in Clear Lake for breakfast the next morning as Tim and the boys made their trip up to Green Bay. (APP-343-345, Tr. 495-497). Throughout much of her testimony about this event, Jodi was very hesitant to admit to many of these facts and was very evasive. For example, she stated that the reasons she may have called her Mr. Enke at 7:47 p.m. on a Saturday night were work related. (APP-344-345, Tr. 496-497). Unfortunately this fits into

a long pattern of Jodi failing to admit to anything that could be potentially detrimental to her position.

Throughout her testimony, Jodi downplayed her relationship with Mr. Enke. She refused to acknowledge him as a significant other, even though Mr. Enke testified in his divorce proceedings that she was his significant other. (APP-428, Tr. 1200). When asked why his vehicle would be located at Jodi's residence in the early morning hours, rather than being forthcoming about their relationship, she said that it could be because he does her snow removal and mows the grass. (APP-252, Tr. 196). When questioned why she may have attended a trip with him in California that she helped pay for, she again said it was at least in part because he helps with the snow removal. (APP-348, Tr. 502). Additionally, when she was pressed on Mr. Enke's vehicle being present in her drive way, she was adamant that it was never when either of the boys were home. (APP-357, Tr. 625). Yet, Mr. Enke's ex-wife lived only a few blocks from Jodi and would see Mr. Enke's vehicle parked at Jodi's residence nearly every morning. (APP-423-424, Tr. 1185-1186).

It is important to note that Tim recognizes that Iowa is a no fault divorce State and the fact that Jodi is in a relationship is not an issue. Instead, her lack of a willingness to truthfully acknowledge the extent of the relationship and be continually elusive regarding her answers is problematic. While at this time it does not appear Mr. Enke and Jodi are attempting to establish a home together if it is

leading to that situation "his…relationship with the children becomes a significant factor in a custody dispute." *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa App. 2004)(citing *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa App. 2003)). Jodi's evasiveness about her relationship calls into question her ability to be open and honest with Tim and the Court about the situation to give everyone the opportunity to address every issue in its fullest context. What is known about Mr. Enke is that a protective order was entered against him by his ex-wife. (APP-440, Tr. 1216). Additionally, Mr. Enke has a history of perpetuating the violence in front of his four children. (APP-440-441, Tr. 1216-1217).

In addition to being generally evasive and not forthcoming throughout her testimony, Jodi also exhibited a reluctance to continue to foster the boys' relationship with the familial support system. No clearer example of this is her constant referral of the Gattons as nothing more than hired help. (APP-261, Tr. 212; APP-331, Tr. 433; APP-177-178, Tr. 84-85). However, in reality, the Gattons were so much more than "hired help" to the Erpeldings and in particular W.E. and D.E. Mr. Gatton did numerous activities with the boys and helped foster a love of the outdoors in each of the children. (APP-488-491, Tr. 1588-1591). Mrs. Gatton would not only help with getting the boys ready for school most mornings, but she would also attend numerous activities. (APP-507-510, Tr. 1643-1646). As the boys have lost all of their grandparents, the Gattons would regularly attend "Grandparents Day"

at the boys' school. (APP-507, Tr. 1643). The Gattons would also attend birthday parties, family events and sporting events of the kids. (APP-509-511, Tr. 1645-1647). They would also take the boys on vacations. (APP-495, Tr. 1600). For much of this work, the Gattons did it for no payment or simple reimbursement of gas or expenses. (APP-511, Tr. 1647). In fact the Gattons never expected payment and felt that they needed this type of a relationship at this point of their lives. (APP-511, Tr. 1647). Rather than promoting this quasi-familial relationship, Jodi significantly downplays the importance of the Gattons and in fact may be interfering with this relationship.

Since the divorce, both of the Gattons have noticed differences in D.E. (APP-498, Tr. 1615; APP-513-514, Tr. 1655-1656). In particular, Mrs. Gatton has recognized that when she is in the presence of both D.E. and Jodi, D.E. will not acknowledge her. (APP-513-516, Tr. 1655-1658). In one instance, Mrs. Gatton recalled an instance at church when she had arrived early with Tim. (APP-515-516, Tr. 1657-1658). When D.E. arrived with Jodi a few minutes later, D.E. stopped and glanced back at his mother. (APP-515-516, Tr. 1657-1658). Mrs. Gatton knew at that moment that D.E. would likely not talk to her that night. (APP-515-516, Tr. 1657-1658). Yet, when D.E. is not around his mother, Mrs. Gatton sees the same old D.E. that she remembers before the separation. (APP-513, Tr. 1655). Additionally, the Gattons have noted that Jodi does not act the same around them.

(APP-517-518, Tr. 1661-1662; APP-499, Tr. 1620). Through cross examination, it was implied that because Tim was calling them as a witness it caused strife between the Gattons and Jodi. (APP-517-518, Tr. 1661-1662; APP-499, Tr. 1620). However, this is exactly the continued problem with Jodi—she is unwilling to act in a manner that promotes the best interests of the children. Nothing typifies this more than the manner in which the boys were informed of the impending dissolution proceedings.

Prior to Jodi and Tim's separation, the parties were attending joint counseling sessions. (APP-206, Tr. 123). When it became apparent that the marriage could not be salvaged, Jodi and Tim inquired as to the best way to notify the boys of their decision. (APP-383, Tr. 842). The counselor recommended that Jodi and Tim sit down together with the boys and inform them of their decision. (APP-383, Tr. 842). However, after an apparently contentious meeting with Tim and his attorney, Jodi stormed out of Tim's attorney's office and got the boys. (APP-383-388, Tr. 842-847). The boys clearly picked up on her visible emotions and she told them that she and Tim were getting a divorce and that Tim "was going to stay away from home for a couple days." (APP-354, Tr. 620). This is obviously a major family event and Jodi completely deprived Tim of the ability to participate in informing the boys of their decision.

Jodi also exhibits a propensity to be accusatorial of Tim and confrontational to the point where it either has or likely will cause issues with the boys. For example, Jodi testified extensively that she believed Tim had intentionally interfered with her ability to access W.E.'s online school and records system. (APP-208-209, Tr. 128-129). She believes that Tim was attempting to prohibit her from knowing what was going on with W.E. by this event. (APP-208, Tr. 128). Not only did Tim outright deny this accusation, but the representatives from the Bishop Garrigan school system testified that it was an administrative error on their part. (APP-470-472, Tr. 1390-1392).

Jodi also exhibited similar behavior in front of D.E. Following a football game in Clear Lake, Tim had approached Mrs. Enke about arranging a play date with D.E. and Mrs. Enke's son who is approximately the same age as D.E. (APP-425-426, Tr. 1189-1190). In fact, D.E. and Mrs. Enke's son know each other quite well and have played on occasions before. (APP-425-426, Tr. 1189-1190). Jodi saw Mrs. Enke, Tim and D.E. conversing from some distance away and came running up to them and caused a scene in front of at least a dozen people. (APP-425-427, Tr. 1189-1191). Jodi said that D.E. was afraid of Mrs. Enke and that D.E. was not allowed to go to Mrs. Enke's house. (APP-425-427, Tr. 1189-1191). This occurred directly in front of D.E. (APP-427, Tr. 1191). Prior to Jodi's outburst and causing a scene, Tim had been simply talking to Mrs. Enke and arranging a play

date. (APP-425-427, Tr. 1189-1191). This type of behavior further exemplifies Jodi's unwillingness to shield the children from such issues and instead, places them in the middle of the dispute.

E. Tim Provides the Necessary Stability to Both W.E. and D.E.

The importance of stability in a child's life cannot be overemphasized. *In re Marriage of Colter*, 502 N.W.2d 168 (Iowa App. 1993). Stability of the parent is one factor in determining the long-term best interests of the children. *See In re Marriage of Worthington*, 504 N.W.2d 147, 150 (Iowa App. 1993)(discussing employment and home stability in awarding physical care); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa App. 1988)(finding father's employment more secure than mother's, particularly as to geographical location). Tim is able to provide a more stable environment for the children and as such the district court erred in denying primary physical care of both W.E. and D.E.

As it relates to W.E. it was without question that W.E. needed to remain with his father on the family farm. First, he was absolutely adamant that he was not willing to enroll in any other school district than Bishop Garrigan. (APP-078, GAL P. 17). In fact, it was recognized by both the guardian ad litem and Tim that if W.E. was not allowed to attend the Bishop Garrigan school system, there would be a likely revolt which would lead to "disciplinary and emotional problems." (APP-392-394, Tr. 879-881; APP-078, GAL P. 17). He is active in numerous extracurricular and

social activities. (APP-394, Tr. 881). W.E. also expressed a genuine desire to remain on the family farm and has begun to show an interest in farming. (APP-374-379, Tr. 831-836). Thus, in order to provide stability in W.E.'s life, he needs to remain on the family farm with Tim.

Similarly, with D.E. in order to provide stability, he should remain on the family farm with Tim. As with W.E., D.E. was actively involved in the Bishop Garrigan school system and had numerous friends. (APP-406-408, Tr. 909-911; APP-392-393, Tr. 879-880). During one of D.E.'s visits with Tim, he saw his friends and reintegrated with them without any issues. (APP-406-408, Tr. 909-911). Further, while D.E. is clearly younger than W.E. and unable to participate in the same level, D.E. has begun to show an interest in the family's farming operation. (APP-381-382; APP-402, Tr. 838-839; 904). In fact, when discussing the issue with the guardian ad litem, he specifically requested long summer vacations with Tim so that he could spend time on the farm. (APP-073, GAL P. 12). He also shows a potential desire to follow his family footsteps and attend Bishop Garrigan High School. (APP-406-408, Tr. P. 909-911, APP-080, GAL P. 19).

Further, as it relates to both boys, their entire family support system is located within the Algona area. Unfortunately, Jodi's parents both passed away at a young age. (APP-244, Tr. 178). Similarly, Tim's mother passed away early in her life and Tim's father recently passed away. (APP-244, Tr. 178). However, several of Tim's

siblings and their spouses continue to live in the area. (APP-484-485, Tr. 1570-1571; APP-457-461, Tr. P. 1326-1330). They are also available to provide support for things such as transportation for the boys and parental supervision if the need ever arises. (APP-463, Tr. 1338). The Gattons are also close by and willing to continue to provide as much support as necessary. (APP-410-411, Tr. 914-915). While Jodi attempts to downplay the role the Gattons play as merely "hired help," that is simply not the case. Instead it is abundantly clear that the Gattons are so much more than a typical daycare provider. They continue to foster their relationship with the boys by taking them on trips, attending social and extracurricular activities and just generally spending time with the boys. Tim provides the necessary environment to continue to foster this relationship and maintain this stable grandparent-like stature with the boys.

Jodi is not able to provide this stability to the boys. She moved to Clear Lake and has no familial support groups available to her there. (APP-244-247, Tr. 178-181). She has two sisters. (APP-245, Tr. 179). One sister lives in Iowa, but she is currently estranged from her and has not seen her for quite some time. (APP-245-247, Tr. 179-181). The second sister she sees maybe once a year and currently lives in San Antonio, Texas. (APP-246-247, Tr. 180-181). This lack of support is further exemplified by the fact that Jodi does not have anyone to watch over D.E. after school each day. (APP-339, Tr. 481). Jodi's work schedule and D.E.'s school

schedule make it so that D.E. spends about thirty (30) minutes to an hour alone each day after school. (APP-339, Tr. 481). Jodi sees no problem with this and thinks D.E. is mature enough to be alone by himself. (APP-332-333, Tr. 455-456; APP-339, Tr. 481). However, if Tim were to have primary physical care of D.E., this would never be allowed and D.E. would either be with him or the Gattons as was done before these proceedings were initiated. (APP-410-411, Tr. 914-915). Thus, when determining which parent can provide the most long-term stability to the boys, the clear answer is Tim.

Finally, Tim has exemplified that he wishes to promote a proper co-parenting setting for the boys. Repeatedly, throughout the course of his testimony, he made it known that he was not wanting to cut Jodi off from the boys. (APP-383, Tr. 842; APP-405-406, Tr. 908-909). He requests that Jodi be awarded "massive" visitation. (APP-447, Tr. 1244). He recognizes that the boys prefer to do certain things with their mother, like buying clothes. (APP-405, Tr. 908). Tim's desire for liberal visitation and recognition of the boys' needs/desires establish Tim's insight into the divorce and his willingness to foster the boys' relationship with Jodi. This continues to solidify why Tim should be awarded primary physical care of both W.E. and D.E. Accordingly, this Court should reverse the district court's split physical care arrangement and award primary physical care of both boys to Tim and remand to the district court for child support calculations.

CONCLUSION

Respondent-Appellee/Cross-Appellant Tim Erpelding respectfully requests this Court (1) affirm the district court's order denying Jodi's request for reimbursement alimony, (2) affirm the district court's award of traditional alimony as is, (3) deny Jodi's alternative request to set aside the premarital agreement, (4) affirm the order that each side pay their own attorney fees, (5) reverse the award of $20,000 in temporary attorney fees, and (6) require the parties to pay their own appellate attorney fees.

Tim further request this Court reverse the district court's split physical care award between the parties. This Court should find that both W.E. and D.E. should be placed in Tim's care and award him primary physical of both boys. This Court should further remand this matter to the district court for a determination of child support to be awarded to Tim. Alternatively, should this Court deny Tim's request of primary physical care of the boys, this Court should remand the case for a proper calculation of Tim's child support calculations.

REQUEST FOR ORAL ARGUMENT

Tim respectfully requests oral argument in this matter.

Respectfully Submitted,

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309

Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com
ckemp@kempsease.com

By: 

MATTHEW G. SEASE

CHRISTOPHER R. KEMP
Attorneys for Respondent-Appellee/Cross Appellant

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief and Argument was $0.00, as it was electronically filed.

KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

_____

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant

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KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

_____

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant

CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I certify on December 14, 2016, I will serve this brief on the Appellant's Attorney, Thomas W. Lipps, by electronically filing it.

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KEMP & SEASE
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@kempsease.com

By: 

MATTHEW G. SEASE
Attorney for Respondent-Appellee/Cross-Appellant